



Early Journal Content on JSTOR, Free to Anyone in the World

This article is one of nearly 500,000 scholarly works digitized and made freely available to everyone in the world by JSTOR.

Known as the Early Journal Content, this set of works include research articles, news, letters, and other writings published in more than 200 of the oldest leading academic journals. The works date from the mid-seventeenth to the early twentieth centuries.

We encourage people to read and share the Early Journal Content openly and to tell others that this resource exists. People may post this content online or redistribute in any way for non-commercial purposes.

Read more about Early Journal Content at <http://about.jstor.org/participate-jstor/individuals/early-journal-content>.

JSTOR is a digital library of academic journals, books, and primary source objects. JSTOR helps people discover, use, and build upon a wide range of content through a powerful research and teaching platform, and preserves this content for future generations. JSTOR is part of ITHAKA, a not-for-profit organization that also includes Ithaka S+R and Portico. For more information about JSTOR, please contact support@jstor.org.

The court affirmed the principle of the preceding case, but held that the action should have been brought *in personam* against the owners of the boat, following the Act of Congress, which prescribes certain remedies for wrongs sustained through the negligence of the officers of steam-vessels.

In *Brannick v. Sea Gull*, 16 Pitts. L. J. 194, the wife sued *in rem*, for damages for the death of her husband, and while navigating in a row-boat in the harbor of Baltimore, was killed by a collision with the defendant steamer. The same judge held that she could recover, and that the court had jurisdiction.

These cases were followed by the district judge of New York, in the case of *The City of Brussels*, 6 Ben. 371; this was in 1873. In *The Steamship Towanda*, 34 Leg. Int. 394, decided in Oct. 1877, by Circuit Judge McKENNAN (affirming the decree of District Judge CADWALLADER), it was held that an action was maintainable in the Admiralty Courts, to recover damages for the wrongful death of a human being. It was an action *in rem*, brought by the wife, whose husband had been killed in a collision at sea. From the agreed statement of facts, it appears that the steamer ran down the schooner, and drowned the chief mate, the husband of libellant; "his death being the direct result of the negligence of the steamer in causing the collision." The jurisdiction of the court in a case of this kind, was the sole question at issue in the Circuit Court. The learned judge admits that at common law, the weight of authority

is against the right of action, and that its origin is purely statutory, but following Chief Justice CHASE, declines to be bound by the decisions of the common law, and adds: The exercise of such a jurisdiction by Courts of Admiralty, is at least consonant with "natural equity, and the general principles of law, and with the benign spirit of English and American legislation on the subject."

The unreported case of *Thomas v. Sherlock* (referred to in the opinion), was compromised by the payment of a sum of money to the libellant. In *Benedict Adm.*, § 309, it is said, "that causes of action for mere personal torts are not regarded in admiralty as surviving the death of the person injured; and a state statute will not enable an administrator to maintain an action for such *tort*, committed on the high seas."

We should rather hope that when the question comes before the Supreme Court of the United States, that distinguished tribunal will find it more consonant with the principles of natural equity and justice to allow the action, than to follow the unreasoned decision of Lord ELLENBOROUGH in *Baker v. Bolton*.

At all events, so far, the precedents, with scarcely an exception, sustain the ruling that the action for a *tort* resulting in death survives the person killed, and an action to recover damages therefor may be brought in a Court of Admiralty, always provided that the injury was received at sea, or upon waters navigable from the sea. H. H.

Supreme Court of Wisconsin.

JANE WILLIAMS v. WILLIAM WILLIAMS.

When the evidence shows that at the time of the commencement of the cohabitation and conduct, from which it is sought to prove a marriage in fact, there was in fact no such marriage, the mere continuance of such cohabitation and conduct,

without something more to indicate that there had been a change in the relations of the parties to each other, would not be sufficient to show a marriage in fact, subsequent to the commencement of such cohabitation and conduct.

Such contract may be proved by circumstances, but they must be such as to exclude the inference or presumption that the former relation continued, and satisfactorily prove that it had been changed into that of actual matrimony by mutual consent.

It was therefore error, where the parties originally cohabited under a void contract of marriage, to refuse to charge that if the subsequent conduct and declaration of the parties arose from and was the result of such void ceremony, that there could be no presumption of a subsequent marriage.

THIS action was brought by the plaintiff to recover her dower in the lands of which Lewis Williams died seised. The defendant pleaded that the plaintiff never was the lawful wife of said Williams. It appeared from the evidence, upon the trial of this issue, that the plaintiff and the deceased participated in a marriage ceremony, at Racine, in the state of Wisconsin, May 9th 1870; which was celebrated by the pastor of the Presbyterian church, and witnessed by the daughter of the plaintiff and two other persons. That the plaintiff thereafter dwelt with the deceased until his death, August 29th 1873, and that she was universally reputed to be his wife during all that time. It was also shown that the plaintiff had joined the deceased, as his wife, in the execution of a warrantee deed dated August 23d 1873. The defendant, on the other hand, proved that the plaintiff was divorced from William Jones, in November 1870, subsequently to her alleged marriage to Williams, under proceedings instituted by her in the Circuit Court for Kenosha county, in the state of Wisconsin, in October 1870, under the name of Jane Jones. In rebuttal the plaintiff introduced evidence to show that the said Jones had formerly married one Amelia Rees, who was still living at the time this issue was tried.

The court, at the request of the plaintiff, charged the jury that "in an action by a widow to recover dower in the lands of her deceased husband, it is not necessary for her to make strict proof of marriage, that is proof of an actual solemnization of marriage—but proof by cohabitation as husband and wife, acts and declarations of the husband recognizing her as his wife, and conduct of the parties may be sufficient."

The defendant asked the court to charge, *inter alia*: "The judgment roll in the case of Jane Jones v. William Jones, which is offered in evidence by the stipulation, is conclusive evidence upon the question as to the plaintiff being the wife of William Jones, in

November 1870, and unless you find that a marriage was solemnized between the plaintiff and Lewis Williams, after the divorce in November 1870, the plaintiff cannot recover, and your verdict must be for defendant." Which request, together with certain other requests, quoted in the opinion of the Supreme Court, were refused by said court.

The court further charged, *inter alia*: "If on the 9th of May 1870, the plaintiff was the lawful wife of Jones, the said marriage of the plaintiff with Lewis Williams was void, and the plaintiff did not thereby become the lawful wife of the said Williams. But if at the time of the plaintiff's marriage to Jones, he, Jones, had a lawful wife then living, the plaintiff's marriage to Jones was void, and did not operate to render her marriage with Williams invalid. The judgment of divorce rendered in November 1870, in the action between the plaintiff and William Jones, has been received in evidence and is claimed by the defendant as conclusive as to the validity of plaintiff's marriage with Jones. I think, and so instruct you, that such judgment is not conclusive in this action as to the validity of such marriage. You will determine from the evidence whether Jones, at the time of his alleged marriage with the plaintiff, had a wife by a previous marriage then living.

And you will determine from a preponderance of the testimony whether the plaintiff was the lawful wife of Lewis Williams, Sr., and his widow. If you so find, then as such widow of said Lewis Williams she is entitled to dower in all of the real estate of which Williams was seised during her coverture, and is entitled to recover during this action."

The defendant duly excepted to the refusal of the court to charge the jury as by him requested, and to the charge as given and above quoted, and the jury having found for the plaintiff, and a new trial being refused, the defendant duly appealed to the Supreme Court.

J. V. & C. Quarles, for respondent.

John T. Fish, for appellant.

TAYLOR, J.—This action is brought by the plaintiff to recover dower in certain lands in the possession of the defendant.

The plaintiff bases her claim for dower upon the allegation that she is the widow of one Lewis Williams, Sr., deceased.

The only question which is seriously litigated is, whether the

plaintiff is the widow of said deceased. The evidence shows that the plaintiff was married by a formal marriage ceremony to said Lewis Williams, Sr., on the 9th day of May 1870, and tends to show that she lived with him as his wife from that time to the time of his death, August 20th 1873.

The appellant claims that at the time plaintiff married the deceased, she was the lawful wife of one William Jones, who was then living and not divorced from the plaintiff. The plaintiff does not deny that she had been married to said Jones, and had lived with him as his wife, but she alleges and shows that she was duly and lawfully divorced from him by the judgment of the Circuit Court of Kenosha county in this state in the month of November 1870.

It appears from the stipulation of the parties, that such divorce suit was instituted by the plaintiff in this action by the name of Jane Jones, and that she alleged in her complaint therein, that she and the said William Jones were duly and lawfully married in Wales, in the year 1863. Such action was commenced in October 1870, the complaint was sworn to by the plaintiff, the summons was personally served on the defendant William Jones, and as a ground for the divorce, the complaint charged the said William Jones with wilful desertion for more than one year before the commencement of such action. The judgment in that action was entered in November 1870, and decreed and adjudged that the marriage theretofore existing between the said Jane Jones and the said William Jones be and the same was thereby dissolved, and each of the parties freed from the obligations thereof.

The plaintiff further gave evidence tending to prove that at the time of her marriage to William Jones, he (Jones), had another wife living, from whom he had been divorced, and who was still living. The plaintiff recovered in the action in the court below, and the defendant appeals to this court. The learned counsel for the plaintiff and respondent insists that she was entitled to recover upon either of two theories: First, if she was the lawful wife of William Jones at the time she married Lewis Williams, Sr., she was afterwards lawfully divorced from said Jones about two years and nine months before the death of Lewis Williams, Sr., and that as during all that time, she and the said Williams lived and cohabited together as husband and wife that she was all that time spoken of by the said Williams as his wife and treated by him as

such ; that she during all that time spoke of said Williams and treated him as such, from the evidence in the case upon that point, if necessary to sustain the plaintiff's claim that she was the widow of said Williams, the jury would be justified in finding a marriage in fact between the said Lewis Williams, Sr., and the plaintiff after her divorce from the said Jones. Second, that there was sufficient evidence in the case to justify the jury in finding that she never was the lawful wife of William Jones, for the reason that he had a wife living at the time she was married to him, and that such wife is still living and not divorced ; consequently her formal marriage with the deceased Lewis Williams, Sr., on the 9th of May 1870, was in every respect a lawful marriage.

The learned counsel for the appellant insists : First, that the judgment rendered in the divorce suit between Jones and Jones, given in evidence and entered sometime in November 1870, is conclusive evidence against the plaintiff, that at the time of the entry of such judgment and from the date of her alleged marriage with the said Williams in 1870, to time of the entry of such judgment, she was the lawful wife of said William Jones, and that as a consequence her marriage with said Lewis Williams, Sr., on the 9th day of May 1870, was absolutely void. Second, that there was not sufficient evidence of an actual marriage between the plaintiff and the said Lewis Williams, Sr., deceased, subsequent to the date of the judgment in said divorce suit, and consequently she had failed to prove that she was the widow of the said deceased. Third, that the court erred in refusing to give to the jury the following instruction asked by the defendant :

“ Testimony has been admitted of acts and conversations of Lewis Williams, Sr., by which he recognised the plaintiff as his wife. This testimony was admitted as being competent and as tending to show that the parties were married. If you find that such acts of Jane Williams and Lewis Williams, Sr., which have been given in evidence, arose from and were the result of a marriage ceremony, which took place between the plaintiff and Lewis Williams, Sr., in May 1870, and that Jane Williams was then the wife of William Jones, and that no marriage was ever solemnized between the plaintiff and Lewis Williams, Sr., after the divorce was granted to the plaintiff in November 1870, from said William Jones, then your verdict must be for the defendant.

“ If you find that Lewis Williams, Sr., spoke of the plaintiff and

introduced her as his wife, because of some pretended marriage between the plaintiff and himself at the time when the plaintiff was the wife of William Jones, and not because of any actual marriage solemnized or contracted after November 1870, then your verdict must be for the defendant. If you find that no legal marriage was ever solemnized or contracted between Jane Williams, the plaintiff, and Lewis Williams, Sr., then all evidence of acts and declarations on the part of Lewis Williams, Sr., are unavailing, and the defendant is entitled to your verdict."

The fact that the first point made by the learned counsel for the appellant, is one of such grave importance to the public and so far reaching in its effects upon the rights of persons not parties to the action for divorce, if sustained to the extent claimed by the learned counsel, and the want of time necessary to enable each member of the court to make a thorough examination of the subject for himself, and the further reason that we are all agreed the judgment must be reversed for the refusal of the court to instruct the jury as requested by the counsel for the defendant, has induced us to leave that question undecided.

That the instructions which are above set forth, and which were requested by the defendant's counsel, or some instructions equivalent thereto, should have been given to the jury, is apparent upon the evidence in the case. The plaintiff had proved a marriage solemnized between herself and the deceased at a time when the jury, from the evidence given on the trial, might have found that she was the wife of said William Jones. It is admitted by the learned counsel for the plaintiff, that it was necessary for her to show by sufficient affirmative proof, that a lawful marriage in fact existed between her and the deceased at the time of his death. There was no pretence that there was any direct proof of any such lawful marriage, unless the marriage on the 9th of May was a lawful marriage, and it is admitted by both parties that such marriage was void, if at that time the plaintiff had another husband living. The evidence also showed that the cohabitation, acts and declarations of the parties as to their living together as husband and wife and their being married, commenced at the date of such marriage in May 1870.

The authorities hold and this court is not inclined to hold otherwise, that in an action for dower the plaintiff is not required to make proof of the actual solemnization of a marriage between the plain-

tiff and the deceased, in whose estate she claims dower, but they also hold that the evidence must be sufficient to establish the fact of a lawful marriage between them. None of the cases hold that living and cohabiting together as husband and wife, or even the declarations of the parties that they are husband and wife, constitute a marriage in fact, or that such acts and declarations are a substitute for the marriage contract; the extent to which the authorities go is, that such evidence may be sufficient to prove a lawful marriage in fact.

The law of this state declares that marriage is a civil contract (see § 2328, Rev. Stat. 1878), and there is no statute law which points out in what manner the contract must be entered into to render it valid. It need not be in writing or in the presence of witnesses, but there must be an agreement between the parties that they will hold toward each other the relation of husband and wife, with all the responsibilities and duties which the law attaches to such relation, otherwise there can be no lawful marriage.

It would seem to follow, therefore, that every lawful marriage must have been entered into by the parties at some particular date or time, and that it cannot in any case be the simple result of cohabitation or the continued conduct of the parties which ordinarily accompany the married state. As a general rule, when a marriage is sought to be proved by conduct, cohabitation and repute, the date of the marriage in fact, which such conduct and repute tend to establish, is the date of the commencement of such conduct and repute and not afterwards.

It follows, therefore, that when the evidence shows that at the time of the commencement of the cohabitation and conduct, from which it is sought to prove a marriage in fact, there was in fact no such marriage, the mere continuance of such cohabitation and conduct, without something more to indicate that there had been a change in the relations of the parties to each other, would not be sufficient to show a marriage in fact, subsequent to the commencement of such cohabitation and conduct.

In the case at bar, if the jury had found that the marriage of the parties on May 9th 1870, was void because of the fact that the plaintiff had another husband then living, and they had also found that all the acts, conduct and declaration of the parties, after the date of the divorce of the plaintiff from such former husband, "arose from and were the result of such void ceremony," such find-

ing, we think, would have negated the inference of any marriage in fact between the parties subsequent to such divorce, and as a consequence, have defeated the plaintiff's recovery.

The same consequences would have resulted from a finding that all the acts, conduct and declarations of Lewis Williams, Sr., were in consequence of a marriage with the plaintiff when she was the wife of another, and not in consequence of any marriage with her after her divorce from such husband, because such finding would necessarily have negated any inference that he had contracted any marriage in fact with the plaintiff after such divorce. However ignorant Lewis Williams, Sr., may have been of the fact that the plaintiff had another husband living at the time he married her, such marriage was absolutely void as to him, notwithstanding his ignorance and good faith, and he could only make her his lawful wife by such marriage in fact, after the divorce of her former husband. We are of the opinion also, that the third instruction requested should have been given, and that the general charge did not cure the error of the refusal. It would seem from the very nature of the matter in issue, that if the jury found that no marriage was in fact ever solemnized or contracted, between the plaintiff and the deceased, all the acts and declarations of the parties were of no avail. The only object in proving the acts and declarations of the parties, was to establish the fact that a marriage was contracted between them, and if the jury found as a matter of fact, that no marriage was in fact contracted, then all the other matters introduced into the case were of no consequence.

The only instructions given to the jury on the subject of what evidence was necessary to establish a marriage between the parties, were the following. At the request of the plaintiff the court gave this instruction: "In an action by a widow to recover dower in the land of her deceased husband, it is not necessary for her to make strict proof of marriage, but proof by cohabitation as husband and wife; acts and declarations of the husband, recognising her as his wife, and conduct of the parties may be sufficient." In the general charge, the court upon this subject said: "And you will determine, from a preponderance of the testimony, whether the plaintiff was the lawful wife of Lewis Williams, Sr., and is his widow." The court also charged the jury, that if they found that the plaintiff had another husband living at the time of her marriage to Williams, on the 9th of May 1870, then such marriage was void,

and that she did not thereby become the wife of said Williams; but he did not instruct the jury that if such marriage, of the 9th of May 1870, was void, she could not recover in this action.

The case was submitted to the jury upon the issue as to whether there had been a marriage in fact between the plaintiff and deceased, after the plaintiff had obtained a divorce from William Jones, upon the theory that it was entirely immaterial to the determination of that issue, that the cohabitation and living together as husband and wife, upon which the plaintiff relied to establish such marriage, commenced at a time when it was impossible for them to contract a lawful marriage. This was undoubtedly an erroneous view of the case.

Courts cannot but look with suspicion upon a claim of marriage, founded upon evidence of cohabitation and conduct, which is consistent with the fact of actual marriage, where the evidence affirmatively shows that at the time such cohabitation and conduct commenced, there was in fact, no marriage, and such cohabitation and conduct was meretricious and in violation of law. When such fact is shown, the effect of the evidence upon the question of a marriage, in fact, at the date of the commencement of such unlawful cohabitation and conduct, is entirely destroyed, and in order to establish a marriage subsequent to the commencement of such unlawful and meretricious conduct, by continued cohabitation, conduct and declarations of the parties, or by reputation, there should be some affirmative evidence showing that the subsequent relations of the parties were changed, and that that which was meretricious and unlawful in its commencement had been rendered lawful.

It would require much less proof to satisfy either a court or jury that there was a marriage in fact between persons in good repute, and as to whom there was no obstacle to marriage, when the proof of marriage depended upon the fact of cohabitation as husband and wife, and the recognition of each other as such, than when it appeared affirmatively that one or both of the parties claiming a marriage, upon like proofs, were at the time of the commencement of the cohabitation incompetent to contract marriage. And this would be especially so if it were shown that the party claiming such marriage, had full knowledge at the time of the commencement of such cohabitation, that he or she was incompetent to contract a lawful marriage with the other party. The fact appearing

that such party unlawfully commenced the cohabitation, would be strong evidence that he or she would not hesitate to continue such unlawful conduct after the disability had been removed. We think the judge of the circuit court ought to have called the attention of the jury to this view of the case and to have at least instructed them, as requested by the counsel for the defendant, that if they found that the plaintiff had another husband living at the time she married the deceased, in May 1870, they must then inquire whether there was any sufficient evidence in the case, from which they could find a marriage in fact between the parties subsequent to the time of her divorce from such former husband; and that he should also have instructed them, that if the continued cohabitation and conduct of the parties, and their declarations as to their being married and being husband and wife, referred to their marriage made in May 1870, and at a time when they could not lawfully marry, and not to any marriage in fact contracted after the plaintiff's divorce, they must find that no marriage in fact was proven.

The general rule upon the question of proof of marriage by proof of cohabitation, conduct and declarations of the parties, is stated by a learned judge as follows: "The general and ordinary presumption of the law is in favor of innocence, in questions of marriage, and of legitimacy where children are concerned. Cohabitation is presumed to be lawful till the contrary appears. Where, however, the connection between the parties is shown to have had an illicit origin, and to be criminal in its nature, the law raises no presumption of marriage:" 2 Kent 87; *Jackson v. Claw*, 18 Johns. 346; 2 Greenl. Ev., § 464; *Physick's Estate*, 4 Am. Law Reg. N. S. 418. The presumption against marriage, where the connection between the parties is shown to have been illicit in origin, may, however, be overcome by proofs, showing that the original connection has changed in its character, and a subsequent marriage may be established by circumstances, without actual proof of a marriage in fact. The cases cited by the learned counsel for the respondent in their brief in this case, fully establish this point; the following cases also illustrate the same subject: *Starr et al. v. Peck*, 1 Hill 270; *Clayton v. Wardell*, 4 N. Y. 230; *Canjolle v. Ferrie*, 23 Id. 90; *O'Gara v. Eisenlohr*, 38 Id. 296; *Foster v. Hawley*, 8 Hun 68. The rule laid down in the last case cited is stated as follows: "A cohabitation illicit in its origin is presumed

to be of that character, unless the contrary be proved, and cannot be transformed into matrimony by evidence which falls short of establishing the fact of an actual contract of marriage. Such contract may be proved by circumstances, but they must be such as to exclude the inference or presumption that the former relation continued, and satisfactorily prove that it had been changed into that of actual matrimony by mutual consent.

We are inclined to hold the rule as above stated to be the proper rule, where applied to a case like the one at bar. Where the party claiming a marriage (on the theory that she was lawfully married to William Jones) deliberately entered into a bigamous marriage contract with the deceased, and commenced cohabitation under such contract, if, notwithstanding the fact that she knowingly commenced cohabiting with the deceased when she was the lawful wife of another, she claims a lawful marriage with such deceased after her divorce, and after she had thereby acquired the right to become his wife, she ought to be required to establish the fact of subsequent marriage, either by express proof of the contract of marriage, or by circumstances which would clearly exclude the presumption that she continued to live with him under such illegal contract of marriage.

The judgment of the circuit court is reversed, and the cause remanded for a new trial.

RYAN, C. J., took no part in this case.

It is an elementary rule of evidence, that where a particular status has been proved, its continuance will be presumed, unless the contrary be shown by testimony sufficient to rebut this *prima facie* inference: *Cargile v. Wood*, 63 Mo. 501-514. If, therefore, cohabitation is illicit in its origin, there is a necessary presumption that the connection continues meretricious, unless there is some evidence that the character of the relation has been changed: *Cunningham v. Cunningham*, 2 Dow. 483; *Stewart v. Robertson*, Law Rep. 2 Sc. Ap. 494; s. c. 13 Eng. Rep. 165; *Yardley's Estate*, 75 Penn. St. 207; *Commonwealth v. Stump*, 53 Penn. St. 132; *Bicking's Appeal*, 2 Brewst. (Pa.) 202;

Wright v. Wright, 48 How. Pr. (N. Y.) 1; *Barnum v. Barnum*, 42 Md. 251; *Redgrave v. Redgrave*, 38 Id. 93; *Jones v. Jones*, 45 Id. 144; *Port v. Port*, 70 Ill. 484; *Floyd v. Calvert*, 53 Miss. 37; *Rundle v. Pegram*, 49 Miss. 751. The mere fact, however, that the relation was unlawful in its inception, does not in any wise debar the parties from entering into a subsequent contract of marriage. "Whether the agreement of marriage preceded or followed the first sexual intercourse, whether it was five or ten years thereafter, if clearly made and proved, it establishes a valid marriage:" *Richard v. Brehm*, 73 Penn. St. 140-5.

In the absence of a nullifying statute

the status of marriage may be created by the simple, secret, and perhaps, even tacit, consent of a man and woman to become husband and wife: *DeThoren v. Attorney-General*, 1 Ap. Cas. 686-9; s. c. 17 Eng. Rep. 72; *Nathans's Case*, 2 Brewst. (Pa.) 149; *Dyer v. Brannock*, 66 Mo. 391. Neither are the essentials of the contract different, where the alliance of the parties was at first illegal. It is manifest, therefore, that a change in the character of the cohabitation, wrought by the fact of marital consent, must frequently be established by circumstantial evidence, as the law does not require that the means taken to work the change should necessarily be the subject of direct proof. The circumstances, however, must not only be sufficient to create a presumption in favor of marriage, but they must also "be such as to exclude the inference or presumption that the former relation continued:" *Foster v. Hawley*, 8 Hun (N. Y.) 68-72. Under ordinary conditions, marriage will be presumed not only from specific facts and circumstances (*Hamilton v. Hamilton*, 9 Cl. & Fin. 327; *Montague v. Montague*, 2 Addams 375; *Vincent's Appeal*, 60 Penn. St. 228; s. c. *De Amarelli's Estate*, 2 Brewst. (Pa.) 239), but also from a constant matrimonial cohabitation and general reputation of marriage; (*Yardley's Estate*, 75 Penn. St. 207; *Bicking's Appeal*, 2 Brewst. (Pa.) 202; *Cargile v. Wood*, 63 Mo. 501; *In the matter of Taylor*, 9 Paige 611), or as it is sometimes termed, the habit and repute of marriage: *Campbell v. Campbell*, Law Rep. 1 H. L. Sc. 182; *DeThoren v. Attorney-General*, 1 Ap. Cas. 686.

This presumption, it should perhaps be noted, is nevertheless purely benevolent in its character; 2 Best on Ev. 624; 1 Taylor on Ev. 140; 1 Bish. on Mar. & Div. § 434, and that marriage will therefore not be inferred when such a conclusion would tend to impute crime

rather than establish innocence: 1 Bish. on Mar. & Div. §§ 444-6; *Jackson v. VanBuskirk*, 18 Johns. 346; *Clayton v. Wardell*, 4 N. Y. 230; s. c. 5 Barb. 214; *Foster v. Hawley*, 8 Hun 68; *Chamberlain v. Chamberlain*, 71 N. Y. 423; *Senser v. Bower*, 1 Pa. 432; *Jones v. Jones*, 45 Md. 144-57; *Redgrave v. Redgrave*, 38 Id. 93; *Weatherford v. Weatherford*, 20 Ala. 548; *Haupt v. Haupt*, 5 Ohio 539; s. c. Wright 156; *Pontney v. Fairhaven*, Brayton (Vt.) 185; *Breakey v. Breakey*, U. C. Q. B. 349-58; *Wheeler v. McWilliams*, Id. 77; *Taylor v. Taylor*, 1 Lee 571; s. c. 5 Eng. Ecc. Rep. 454. Thus in *Foster v. Hawley*, decided by the New York Supreme Court, and cited in the principal case; a married man consorted with a strange woman for over twenty-four years, and she bore him ten children; at the expiration of this period, the husband obtained a divorce from his wife and continued to reside with the woman for six months longer, when they separated and each remarried. Under these circumstances, the court refused to presume that a contract of marriage had been entered into, after the impediment to marriage had been removed by the divorce, and before the parties had separated and formed new matrimonial relations.

"We cannot," said the court, "raise a presumption of a contract of marriage where the direct consequence of so doing would be to involve both parties to it in the crime of bigamy." It is intimated, however, in the principal case, that there must be "something more" than the presumption deduced from cohabitation and reputation, to rebut the presumption arising from the illegal origin of the relation, when the cohabitation and reputation began at a time when there could have been no marriage in fact. This doctrine seems to be founded upon the theory that the present repute and conduct of the parties, must necessarily

relate back to the time when such repute was without foundation in fact, and when the conduct of the parties was admittedly fraudulent. It is manifest, however, that, if such indeed be the law, it is rendered very difficult, if not in fact impossible, for parties to purge a meretricious alliance of its illegal taint, without the publication of their own shame, and the declaration of their childrens' infamy. It was therefore said by Lord CHELMSFORD, in *De Thoren v. Attorney-General*, *supra*, that "if the cohabitation begins in an illicit intercourse, and is continued after the bar to marriage (whatever it may be) is known to be removed, habit and repute may have their proper operation upon the continuing cohabitation, which is not to be referred to the original intercourse." (Page 694.) The conflicting position taken in the principal case would seem to be based upon the supposed necessity that the evidence should not only inferentially establish the fact of marriage, but also the specific moment of time at which the parties contracted to be husband and wife. But in *Campbell v. Campbell*, which was a well considered case, a wholly different view seems to have been taken. Said Lord WESTBURY: "There is no foundation for the argument that the matrimonial consent must of necessity be referred to the commencement of the cohabitation, nor any warrant for the appellant's ingenious argument that, as the consent interchanged must be referred to some particular period, which he insisted was at the commencement of the cohabitation, and therefore insufficient, the cohabitation, which continued afterwards without interruption, would warrant no other conclusion than that which would be warranted by the consent interchanged at a time when it was insufficient. I should undoubtedly oppose to that another, and, I think, a sounder rule and principle of law, namely, that you must infer the consent

to have been given at the first moment when you find the parties able to enter into the contract."

It, nevertheless, frequently happens, when there was no impediment to the marriage, and the cohabitation was at first voluntarily illicit, that the time of the change in the character of the relation can only be approximately determined. Said the auditor in *Phy-sick's Estate*, 4 Am. Law Reg. N. S. 418; "The exact date of a marriage proved by testimony of this nature cannot be accurately decided." See also *Canjolle v. Ferrie*, 23 N. Y. 90; s. c. 26 Barb. 177; *Ferrie v. The Public Administrator*, 3 Bradf. (N. Y.) 151. If, however, there is no general reputation of marriage, and the cohabitation was illicit in its origin, it is clear that the allegation that the marriage took place at a specific time, and at a certain place, must be clearly proved, in order to defeat the *prima facie* presumption that the continued cohabitation was not matrimonial: *Cargile v. Wood*, 63 Mo. 501; *Barnum v. Barnum*, 42 Md. 251. It has also been held that the inference in favor of marriage could not be drawn from cohabitation and reputation, where it was alleged that the marriage took place at a definite time and in a certain manner: *Blackburn v. Crawfords*, 3 Wall. 175-194; *Redgrave v. Redgrave*, 38 Md. 93; *Cram v. Burnham*, 5 Me. 214. This doctrine however seems to have been questioned. (See dissenting opinion of CLIFFORD, J., in 3 Wall. 195; Bingham on Descents 458; and a contrary view is expressed in *Campbell v. Campbell*, and *De Thoren v. Attorney-General*. In *Campbell v. Campbell* the wife was married, in the presence of a minister, during the lifetime of her first husband, to a man with whom she thereafter continuously cohabitated both before and after her husband's death. Under these circumstances Lord CRANWORTH said: "Assuming such a ceremony to have

been gone through, the question still remains behind, whether its existence is sufficient to rebut what would, I think, have been, if it had not existed, the irresistible presumption of marriage afforded by the rest of the evidence. I think not. This bigamous marriage ceremony did not prevent the parties to it from afterwards becoming husband and wife, if they were minded so to do." (P. 205.) "In such circumstances," he continued, "we ought to infer, after their deaths, that at some time during the long period during which they lived together, and in some manner, however informal, they did that which they could do without any difficulty, viz., enter into an agreement to be or become married persons, and so to acquire for themselves and their children the status which the evidence satisfies me they wished to enjoy." (P. 206.)

It would therefore seem to be well established as a general proposition, that marriage may be inferred from continuous cohabitation and uninterrupted repute, despite the conflicting presumption that springs from the meretricious inception of the sexual relations: *Wilkinson v. Payne*, 4 Durnf. & East 468; *Fenton v. Reed*, 4 Johns. 52; *Jackson v. Claw*, 18 Id. 346; *Rose v. Clark*, 8 Paige 474; *Physick's Estate*, 4 Am. Law Reg. N. S. 418; *Hyde v. Hyde*, 3 Brad. (N. Y.) 509; *Donnelly v. Donnelly*, 8 B. Mon. 113-7; *Dickerson v. Brown*, 49 Miss. 357; *Floyd v. Calvert*, 53 Miss. 37-46; *State v. Worthingham*, 23 Minn. 528; *Blanchard v. Lambert*, 43 Iowa 228; *Holabird v. Ins. Co.*, 12 Am. Law Reg. N. S. 567; s. c. 2 Dill. C. C. 167; *Jones v. Jones*, 45 Md. 155; *North v. North*, 1 Barb. Ch. 241-3. It was said indeed in *Physick's Estate*, that "in the event of such countervailing presumptions, that in favor of innocence must prevail." Although this presumption can only be overthrown

by "strong and cogent evidence to the contrary:" *DeThoren v. Attorney-General*, *supra*, p. 690; yet it may be questioned whether it will necessarily prevail in every instance over the conflicting inference that the original status of the parties remained unchanged. It is not clear that any greater technical force is to be given to this presumption than is warranted by the evidence from which it is derived: *O'Gara v. Eisenlohr*, 38 N. Y. 296-304. It was therefore said by Lord CRANWORTH, that "where a man and woman have lived together as husband and wife, at a time when they could not be husband and wife, and where they continued to live together in the same manner after it has become possible for them to become husband and wife, the question whether they have become husband and wife, is a question not of law but of fact. The law permits them to create that relation between themselves, and whether they have done so, must be decided like any other question of fact. The circumstance that they represented themselves to be man and wife, when they knew they were not so, may reasonably be taken into account in estimating their subsequent conduct. It may neutralize the effect which would otherwise have been properly given to their subsequent cohabitation, that is, it may do so as matter of fact; I cannot think that it must do so as matter of law; and if that be so, then all which any tribunal can do which has to deal with such a question is, to look to all the circumstances of the case, and consider whether they do or do not lead to the conclusion that the parties did contract marriage at some time after it was possible for them to marry:" *Campbell v. Campbell*, *supra*, p. 201.

The rule thus laid down was illustrated by the recent case of the *State v. Worthingham*, 23 Minn. 528. That was a proceeding in bastardy, in which the defendant pleaded that the woman was

his wife. When the parties first cohabited, the man was married to another woman, but he subsequently obtained a divorce, and continued to reside with the mother of the alleged bastard until these proceedings were instituted. Under these circumstances, the supreme court held that the trial court erred in refusing to permit the defendant to prove by his alleged wife, "that during all the time she lived and cohabited with the defendant, and at the time the child was begotten, as charged in the complaint, she held herself out to her friends, neighbors and the world generally, as the wife of the defendant; that the parties went to St. Paul and remained one night, and returned to Minneapolis, and then represented to the world that they had been married; that the complaining witness thereafter assumed and went by the name of Worthingham. (P. 531.) "The point is presented by counsel for the state," said the court, "that no presumption of marriage can arise in this case from any cohabitation of the parties occurring after the defendant's divorce, because of its illicit character in the beginning. An intercourse originally unlawful and lustful from choice, undoubtedly raises the presumption that its character remains such during its continuance. But this is a presumption, not of law but of fact, for the consideration of the jury in connection with the particular facts and circumstances of the case. In the case at bar, it appears that the cohabitation between the parties had its origin, in part at least, in a desire for marriage, and under a promise that such a relation should be assumed as soon as defendant could procure a divorce from his then wife. This indicates that the parties regarded the married state as one preferable to that of concubinage, and weakens somewhat the force of the presumption ordinarily attaching to an original illicit cohabitation. The weight which is to

be given to it, however, in this as in every other case, rests exclusively with the jury in the exercise of its best judgment, under proper instructions from the court." (P. 536-7.) Such proper instructions combining the two elements which were severally wanting in the above and the principal case, was found in the words of TREAT, J., in his charge to the jury, in the case of *Holabird v. Atlantic Ins. Co.*, 12 Am. Law Reg. N. S. 566, where he said: "The attention of the jury is directed to the difference between a mere attempted recognition of a past void marriage and a subsequent expression of mutual and then present consent to be husband and wife. The subsequent marriage may be proved by habit and repute, if the evidence thereof satisfies the jury that the parties had mutually agreed to become husband and wife in good faith and cohabited thereafter as such." (P. 568.)

See also, *Rex v. Twining*, 2 B. & Ald. 386; *Rex v. Harbone*, 2 Ad. & El. 540; *Lapsley v. Grierson*, 1 H. L. Cas. 498; *Greenboro' v. Underhill*, 12 Vt. 604; *Spears v. Burton*, 31 Miss. 547-54; *Wilkie v. Collins*, 48 Id. 496-511; *Yates v. Houston*, 3 Tex. 433; Best on Presump., 22 Law Lib. 4th series, p. *61; 1 Bish. on Mar. & Div., § 456, where the presumption in favor of the innocence of a conjugal union was brought in conflict with the ordinary presumption of the continuance of the life of a former wife or husband. Thus, in the syllabus to *Lapsley v. Grierson*, *supra*, it is stated that, "there is no absolute presumption of law as to the continuance of life, nor any absolute presumption against a party doing an act because the doing of it would make him guilty of an offence against the law. In every instance the circumstances of the case must be considered." And in *Rex v. Harbone*, DENMAN, C. J., says, "that nothing can be more absurd than the notion, that there is to be any rigid presumption of law on such a question

of fact, without reference to accompanying circumstances, such for instance, as the age or health of the party." It would therefore seem, that when the circumstantial evidence in support of marriage becomes confused by conflicting inferences, that it rests wholly with the jury, unbiassed by any binding in-

struction from the court to weigh against each other the fundamental facts from which the countervailing presumptions are deduced, and to strike that balance which best accords with the special circumstances of each individual case. J. P. B.

Supreme Court of Tennessee.

JACOB RENEGAR v. THOMAS C. THOMPSON.

If a creditor take a mortgage from the principal debtor on sufficient property to secure his debt, and afterwards enter into a different agreement with such debtor and abandon the mortgage, such acts will discharge the surety, who may make the defence in a court of law and will not be compelled to resort to a bill in equity.

ON the 18th April 1873, James Mathews, with James Tatum and Jacob Renegar as his sureties, executed his note to Thompson for \$300, due 25th December thereafter. On 25th November 1875, suit was brought. The defences of the security, Renegar, were, First: That he had given to Thompson verbal notice to collect the note, &c.; second: that Thompson had taken a mortgage from Mathews on a saw-mill, of the value of \$2000 or \$2500, to secure said debt, and afterwards abandoned the mortgage and made another and different arrangement with the principal, Mathews, without the knowledge or consent of Renegar. These facts were proven on the trial.

The opinion of the court was delivered by

TURNEY, J.—The verbal notice to sue was not a defence at law, as the statute requires such notice to be given in writing and proven by two witnesses. The circuit judge ruled that the taking of the mortgage and its abandonment for "another and different arrangement," as the plaintiff was shown to have admitted, was no defence to the action. This was error; the rule is, a creditor must, in all transactions with the principal debtor, act with the most perfect good faith toward sureties, for if he does any act injurious to them or inconsistent with their rights, or omit to do any act, which his duty to them requires, whereby they are injured, they will be discharged from responsibility: *Bond v. Ray*, 5 Humph. 492.

We know of no case in our state in which this question has arisen at law. In the case of *King v. Baldwin*, 17 Johns. 384, Chief Justice SPENCER said: "The principle adopted by this court